No. 20-1422

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

SAFEHOUSE, et al.,

Defendant-Appellee.

On Appeal from the U.S. District Court for the Eastern District of Pennsylvania, Gerald Austin McHugh, District Judge

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BRIEF OF *AMICI CURIAE* MEMBERS OF CONGRESS IN SUPPORT OF THE UNITED STATES OF AMERICA AND REVERSAL OF THE JUDGMENT BELOW

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CORPORATE DISCLOSURE STATEMENT

Amici are not publicly-held corporations, do not have parent corporations, and do not issue stock. *See* Fed. R. App. P. 26.1.

RULE 29 STATEMENTS

Amici file this brief with the consent of all parties. *See* Fed. R. App. P. 29(a)(2). No party or party's counsel authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting the brief. No person other than *amici* and their counsel contributed money that was intended to fund preparing or submitting the brief. *See* Fed. R. App. P. 29(a)(4)(E).

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INTEREST OF *AMICI CURIAE*

Amici are Members of Congress. As federal officials and members of the legislative branch, *amici* have a strong interest in upholding the laws that Congress has enacted and the Constitution's bedrock separation of powers. In particular, *amici* seek to ensure that the laws Congress has enacted are faithfully interpreted by the judicial branch in the cases and controversies that come before it. Moreover, *amici* have a special interest in the faithful interpretation of Congressional enactments that have a direct effect on their states and in the lives, neighborhoods, and communities of their constituents.

The Constitution's separation of powers is of vital import in cases such as this one involving Congress's comprehensive nationwide effort, codified in the Controlled Substances Act (CSA), to protect the nation's citizens, neighborhoods, and communities from the devastating scourge of illegal drug use. Policy decisions involving controlled substances have a critical impact on our nation—and often prompt fierce debate among competing viewpoints. That debate is for the people's representatives in Congress, not the federal courts, to resolve. *Amici* respectfully ask the Court to interpret the CSA as written by Congress, to reverse the judgment below, and—in accordance with the Constitution—to reserve the policy decision at the heart of the district court's opinion to Congress.

INTRODUCTION

The CSA codifies Congress's effort to stem the tide of illegal drugs that has devastated the lives of too many of the nation's citizens, neighborhoods, and communities. Through the CSA, Congress has directly criminalized the actions of individuals who manufacture, distribute, possess, or use illegal drugs. *See* 21 U.S.C. §§ 841, 844. But Congress did not stop there: through the provision at issue in this case, 21 U.S.C. § 856(a)(2), Congress has taken the next step and criminalized the actions of individuals who knowingly make their property available to others who manufacture, distribute, possess, or use illegal drugs. The purpose of this provision is plain: to protect citizens, families, and their property by preventing the scourge of illegal drug activity and its ill effects from taking root in their neighborhoods and communities.

Accordingly, section 856 prohibits any individual from "[m]aintaining drug-involved premises." 21 U.S.C. § 856. Section 856(a)(2) in particular declares it "unlawful to . . . manage or control any place, . . . and knowingly and intentionally . . . make available for use . . . the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance." *Id.* § 856(a)(2).

This plain statutory text is the beginning and the end of this case. The district court's own description of the facts demonstrates that Defendant Safehouse's proposed safe injection site violates section 856(a)(2). In particular, the district court acknowledged that:

- "Safehouse will manage or control a place and make that place available" for use by other individuals, *United States v. Safehouse*, 408 F. Supp. 3d 583, 592 (E.D. Pa. 2019);

- Those individuals "undisputedly will use drugs on Safehouse's property," *id.*;

- Such drug use is "unlawful[]," *id.* at 594-95; and

- "Safehouse knows and intends that some drug use will occur on its property," *id.* at 606.

As explained below, these facts alone establish that Safehouse's proposed facility violates section 856(a)(2).

The district court avoided this textually-mandated result only by making a series of legal errors and misappropriating Congress's role to decide the nation's drug-control policy. The court invented new concepts of statutory construction at odds with the holdings of the Supreme Court and this Court, disregarded the uniform construction of section 856(a)(2) adopted by the federal circuit courts, grafted its own language onto the CSA, and substituted its own policy preferences for the directives of Congress. This Court should reverse the judgment below and reserve to Congress the important, complex, and ongoing policy debate regarding the use and location of safe injection sites in Pennsylvania and throughout the country.

ARGUMENT

I. CONGRESS PROHIBITED SAFEHOUSE'S PROPOSED FACILITY IN THE CSA.

Section 856(a)(2)'s plain language prohibits Safehouse's proposed facility. That is the end of the matter. If more were somehow needed, the district court's judgment

departs from the uniform authority of this Court's sister circuits and rests on flawed notions of statutory construction irreconcilable with governing law. The Court should reverse and enter judgment for the United States.

A. The CSA's Plain Language Prohibits The Proposed Facility.

"Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175-76 (2009) (quoting *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004)). "Unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006). Where, as here, the words of a statute are plain, "it is [the court's] duty to give effect to the plain language of the statute." *Parker v. Montgomery Cty. Corr. Facility/Bus. Office Manager*, 870 F.3d 144, 153-54 (3d Cir. 2017) (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) ("[W]here, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'")).

Section 856(a)(2), a component of Congress's prohibition on "[m]aintaining drug-involved premises," provides in pertinent part:

> [I]t shall be unlawful to . . . manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.

21 U.S.C. § 856(a)(2). The district court's own description of the facts demonstrates that Safehouse's proposed facility meets all of these elements and thus violates the statute. Indeed, the very *purpose* of Safehouse's enterprise is to make its space available for people to come and use illegal drugs in a purportedly "safe" manner.

1. "Manage or control," and "make available for use," "any place." As the district court recounted, this element is satisfied because "Safehouse will manage or control a place and make that place available to" the people who will come there to inject themselves with illegal drugs. *Safehouse*, 408 F. Supp. 3d at 592.

2. Unlawfully using a controlled substance. The district court recognized that the people who come to the facility "undisputedly will use drugs on Safehouse's property," *id.*, and that such use is "unlawful[]," *id.* at 594-95. Indeed, the district court recognized that the CSA does not allow the drug use that will occur at the facility, *see id.* at 592-94, because the opioids that will be used there are clearly illegal, *id.* at 592-95; *see also id.* at 610 ("[Section] 812 of the CSA expresses a congressional judgment that Schedule I drugs have 'no currently accepted medical use in treatment in the United States' and that '[t]here is a lack of accepted safety for use of the drug or other substance under medical supervision.'" (quoting 21 U.S.C. § 812)); *see also id.* ("Similarly, Schedule II reflects a congressional judgment that covered drugs, including fentanyl, cannot be used safely without a prescription.").

3. Knowingly and Intentionally. The district court noted that "Safehouse knows and intends that some drug use will occur on its property." *Id.* at 606. Again,

Safehouse does not even try to claim that it does not know and intend for drug use to occur in the space that it makes available for that purpose.

4. For the Purpose of Unlawful Drug Use. It is also undeniable that Safehouse is making its facility available "for the purpose of" unlawful drug use. The five federal courts of appeals that have addressed the question have agreed that "the purpose of unlawfully . . . using a controlled substance" in section 856(a)(2), 21 U.S.C. § 856(a)(2), refers to the purpose of the individual using the property, not the defendant making it available, *see United States v. Chen*, 913 F.2d 183, 190 (5th Cir. 1990); *United States v. Tamez*, 941 F.2d 770, 774 (9th Cir. 1991); *United States v. Ramsey*, 406 F.3d 426, 431-32 (7th Cir. 2005); *United States v. Wilson*, 503 F.3d 195, 197-98 (2d Cir. 2007); *United States v. Tebeau*, 713 F.3d 955, 959-61 (8th Cir. 2013). The structure of the CSA fully supports this conclusion as a separate statutory provision, section 856(a)(1), already criminalizes the knowing use of a place for *one's own* unlawful drug use. Section 856(a)(2) thus criminalizes knowingly making a place available for *another person's* purpose of unlawful drug use. *See, e.g.*, *Chen*, 913 F.2d at 190; *Tamez*, 941 F.2d at 774; *Ramsey*, 406 F.3d at 431-32; *Wilson*, 503 F.3d at 197-98; *Tebeau*, 713 F.3d at 959-61.

Here, it is undisputed that the individuals Safehouse proposes to welcome would enter its facility with that proscribed purpose. Those individuals "undisputedly will use drugs on Safehouse's property," *Safehouse*, 408 F. Supp. 3d at 592, and such use is "unlawful[]," *id.* at 594-95; *see also id.* at 592-93, 610. Accordingly, section 856(a)(2)'s

purpose element is satisfied. *See, e.g.*, *Chen*, 913 F.2d at 190; *Tamez*, 941 F.2d at 774; *Ramsey*, 406 F.3d at 431-32; *Wilson*, 503 F.3d at 197-98; *Tebeau*, 713 F.3d at 959-61.

In any event, even if the purpose element focuses on the *defendant's* purpose to allow unlawful drug use on its property, Safehouse clearly has that purpose. After all, as the district court conceded, "Safehouse knows and intends that some drug use will occur on its property." *Safehouse*, 408 F. Supp. 3d at 595-606. That is the entire point of what Safehouse is doing—creating a purportedly "safe" place for drug use to occur. It is not as if Safehouse is opening a concert venue or a community center for some entirely different purpose, without any knowledge that unlawful drug users will invade the space. Quite to the contrary, Safehouse is opening the facility specifically as a haven for the use of illegal drugs.

Safehouse staff will even *facilitate* that activity by "offer[ing] a variety of services" to illegal drug users, including "use of medically supervised consumption and observation rooms." *Id.* at 586. Safehouse also will provide "sterile consumption equipment" and "fentanyl test strips" to every individual "who choose[s] to use drugs" in the "consumption room" on its premises. *Id.* Furthermore, Safehouse staff members will "supervise [users'] consumption" and provide a place for users to "dispose of used consumption equipment." *Id.* And Safehouse will also make available to users an "observation room" staffed by "peer counselors," "recovery specialists, social workers, and case managers." *Id.* On any reading, these activities evince a clear intent by Safehouse to make its property available for unlawful drug use.

The plain statutory text is the beginning and the end of this case. On the district court's own version of the facts, Safehouse's proposed injection site violates section 856(a)(2). The Court should reverse the judgment below and enter judgment for the United States.

B. The Federal Circuit Courts Have Uniformly Interpreted The CSA In A Manner That Prohibits Safehouse's Proposed Operation.

Because the decision below is contrary to the statutory text, this Court should reverse on that basis alone. *See supra* Part I.A. But if more were somehow needed, the Court should follow the uniform decisions of the other federal circuit courts, which have construed section 856(a)(2) and its purpose element in a manner that prohibits Safehouse's operation.

To begin—contrary to the district court's holding, *see Safehouse*, 408 F. Supp. 3d at 592—*none* of the five federal circuit courts to have addressed the question has found "ambiguous" section 856(a)(2)'s reference to "the purpose of unlawfully . . . using a controlled substance," 21 U.S.C. § 856(a)(2). Rather, those courts have found the term "not ambiguous," *Tamez*, 941 F.2d at 773-74, and have construed it in accordance with its ordinary meaning, including by reference to dictionary definitions, *see, e.g.*, *Chen*, 913 F.2d at 190; *Tamez*, 941 F.2d at 774; *Ramsey*, 406 F.3d at 431-32; *Wilson*, 503 F.3d at 197-98; *Tebeau*, 713 F.3d at 959-61.

Resting upon that ordinary meaning, the five circuits uniformly have held that "the purpose of unlawfully . . . using a controlled substance" required by section

856(a)(2) is the property user's purpose, not the defendant's purpose. *See, e.g.*, *Chen*, 913 F.2d at 190; *Tamez*, 941 F.2d at 774; *Ramsey*, 406 F.3d at 431-32; *Wilson*, 503 F.3d at 197-98; *Tebeau*, 713 F.3d at 959-61. In other words, those courts have held that section 856(a)(2) requires only "that the manager or controller of the property make it available to others, knowing that the proscribed use will occur." *United States v. Ford*, 371 F.3d 550, 554 (9th Cir. 2004) (emphasis omitted); *see also Tamez*, 941 F.2d at 774 ("[S]ection 856(a)(2) requires only that [the] proscribed activity was present, [and] that [the defendant] knew of the activity and allowed that activity to continue."). As those courts have reasoned, this construction is necessary to give full meaning to section 856(a)(2) because section 856(a)(1) already prohibits a person from knowingly using property for the purpose of that person's *own* unlawful drug-related activities. *See, e.g.*, *Chen*, 913 F.2d at 190; *Tamez*, 941 F.2d at 774; *Ramsey*, 406 F.3d at 431-32; *Wilson*, 503 F.3d at 197-98; *Tebeau*, 713 F.3d at 959-61.

The Eighth Circuit's decision in *Tebeau* is instructive. The defendant in that case hosted music festivals on his property "at which drug use was widespread." 713 F.3d at 957. The defendant "operated a medical facility" on his property "where [attendees] who had overdosed were treated during each festival." *Id.* at 958. The evidence showed that the defendant was aware of and tolerated drug use at the festivals. *See id.*

On appeal, the defendant argued that his conviction for violating section 856(a)(2) should be set aside because the purpose element "should be read to require the government to show that he had the specific intent to store, distribute, manufacture, or

use drugs" on the property. *See id.* at 958-59. Construing the plain statutory text, the Eighth Circuit agreed with the unanimous weight of authority from other circuits that "§ 856(a)(2) does not require proof that [a defendant] had the illegal purpose to use, manufacture, sell, or distribute controlled substances; it is sufficient that [the defendant] intended to make his property available to others who had that purpose." *Id.* at 961 (discussing cases). It therefore affirmed the defendant's conviction. *See id.*

The district court's own recitation of the facts demonstrates that Safehouse's proposed facility violates section 856(a)(2) as construed by the five federal circuits. In particular, as explained in greater detail above, *see supra* Part I.A, the district court acknowledged that:

- "Safehouse will manage or control a place and make that place available" for use by other individuals, *Safehouse*, 408 F. Supp. 3d at 592;
- Those individuals "undisputedly will use drugs on Safehouse's property," *id.*;
- Such drug use is "unlawful[]," *id.* at 594-95; and
- "Safehouse knows and intends that some drug use will occur on its property," *id.* at 606.

These facts demonstrate that Safehouse would "make [its facility] available to others, knowing that the proscribed use will occur," *Ford*, 371 F.3d at 554 (emphasis omitted), or, in other words, "intend[s] to make [its] property available to others who ha[ve] th[e] purpose" to engage in unlawful drug activity, *Tebeau*, 713 F.3d at 961. The

Court should adhere to the plain-text construction of section 856(a)(2) adopted in the unbroken line of authority in its sister circuits and reverse the district court's judgment.

C. The District Court's Analysis Was Legally Flawed.

The district court "agree[d] that, taking each of the statute's words literally, it might be possible to read § 856(a) to apply to Safehouse." *Safehouse*, 408 F. Supp. 3d at 592; *see also id.* at 585 (averring that section 856(a)(2) "can certainly be interpreted to apply to Safehouse's proposed safe injection site"). The district court nonetheless reasoned that even though Safehouse "knows and intends that some drug use will occur on its property," *id.* at 606—and in fact would furnish drug users with "consumption and observation rooms," "sterile consumption equipment," and "fentanyl test strips" to facilitate such unlawful use, *id.* at 586—"it does not necessarily follow that [Safehouse] will knowingly and intentionally make the place available *for the purpose of* unlawful drug activity," *id.* at 606 (emphasis in original). The district court ultimately concluded that Safehouse lacks such a purpose and, thus, that its proposed facility would not violate section 856(a)(2). *See id.* at 614-17.

That conclusion rests on a series of legal errors. *First*, the district court's approach to statutory construction is irreconcilable with the governing decisions of the Supreme Court and this Court. The district court reasoned that a statute's "ordinary meaning" refers to "the meaning consistent with the undisputed, prototypical examples of circumstances in which the statute applies—those to which legislators and members of the public would have expected the statute to apply at the time of enactment."

Safehouse, 408 F. Supp. 3d at 591. Building on this premise, the district court held that section 856(a)(2) cannot apply to "safe injection sites" because such sites were not "within the contemplation of Congress either when it adopted § 856(a) in 1986, or when it amended the statute in 2003." *Id.* at 585, 591. In other words, according to the district court, a statute may not reach circumstances that were "not within the contemplation of Congress when it enacted or amended th[e] statute." *Id.* at 615.

The district court, however, did not consistently embrace its conclusion that safe injection sites fall outside of section 856(a)(2)'s coverage. As mentioned above, the district court separately held that Safehouse's site satisfies section 856(a)(2)'s "any place" element. *See supra* Part I.A; *Safehouse*, 408 F. Supp. 3d at 592 ("Safehouse will manage or control a place and make that place available."); *see also Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'") (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)). Yet the district court never attempted to reconcile its conclusions that Congress's purported failure to "contemplate" safe injection sites *excludes* such sites from the "purpose" element, but somehow does *not* exclude them from the "any place" element. *Safehouse*, 408 F. Supp. 3d at 585, 591, 592, 615.

Unsurprisingly, this strained reading of section 856(a)(2) violates bedrock principles of statutory construction. The only authority that the district court cited for its novel premise equating "ordinary meaning" with "prototypical examples" is a lone law review article—and, more precisely, a section within that article titled "Plain and

Ordinary Meaning: A Psycholinguistic Account." *Id.* at 591 (citing Lawrence Sloan, *The New Textualists' New Text*, 38 Loy. L.A. L. Rev. 2027, 2040-42, 2044 (2005)). Regardless of the merits of the "psycholinguistic account" of "prototypical examples," it is not the law. Rather, courts determine a word's "ordinary meaning" by reference to its "dictionary definition" and the context in which the word is used. *Yates v. United States*, 574 U.S. 528, 537 (2015); *Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070-71 (2018); *Gonzales*, 520 U.S. at 5.

More importantly, regardless of the fatal flaw in its premise, the district court's conclusion that statutes may not reach circumstances that Congress did not "contemplat[e]," *see Safehouse*, 408 F. Supp. 3d at 585, 593, 613, 615, is exactly backwards. As the Supreme Court and other courts repeatedly have held, "the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Penn. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) (internal quotation marks omitted); *see also PGA Tour, Inc. v. Martin*, 532 U.S. 661, 689 (2001); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985); *Arizona v. Tohono O'odham Nation*, 818 F.3d 549, 557 (9th Cir. 2016); *Sabre, Inc. v. Dep't of Trans.*, 429 F.3d 1113, 1122 (D.C. Cir. 2005). In other words, that "Congress did not envision" every conceivable circumstance to which a statute might apply "is irrelevant" "in the context of an unambiguous statutory text." *Yeskey*, 524 U.S. at 212 (internal quotation marks & alteration omitted); *see also Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1143 (2018)

("Even if Congress did not foresee all of the applications of the statute, that is no reason not to give the statutory text a fair reading.").

This principle applies with full force to circumstances that existed—and that Congress could have contemplated—at the time of the statute's enactment. For example, Congress's failure to envision that the Americans with Disabilities Act (ADA) would apply to state prisons, *Yeskey*, 524 U.S. at 212, or PGA golf tournaments, *PGA Tour*, 532 U.S. at 689—even though both existed at the time of the ADA's enactment in 1991—did not exempt those entities and activities from the sweep of the ADA's plain text, *Yeskey*, 524 U.S. at 212; *PGA Tour*, 532 U.S. at 689.

Accordingly, it is unsurprising that this principle also applies to *future* circumstances that did *not* yet exist—and that Congress could not have contemplated—at the time of enactment. As the Supreme Court recently explained in *Wisconsin Central*, "[w]hile every statute's *meaning* is fixed at the time of enactment, new *applications* may arise in light of changes in the world." 138 S. Ct. at 2074 (emphases in original). For example, when Congress enacted the wire fraud statute, 18 U.S.C. § 1343, in 1952, it could not have contemplated the founding of PayPal in 1998, *see* PayPal, *available at* https://en.wikipedia.org/wiki/PayPal (last accessed Apr. 20, 2020), or the invention of the automated teller machine (ATM), which debuted in the United States in 1969, *see* Automated teller machine, *available at* https://en.wikipedia.org/wiki/Automated_teller_machine (last accessed Apr. 20, 2020). Yet federal courts—including the district court itself in prior cases—have applied the wire fraud statute to schemes

or artifices to defraud using PayPal or ATMs. *See, e.g.*, *United States v. Goodchild*, No. 2:17-cr-00549, 2019 WL 7166086 (E.D. Pa. Oct. 21, 2019) (McHugh, J.) (PayPal); "Philadelphia Bookkeeper Sentenced to 8 ½ Years in Prison for Embezzling Almost $1.6 Million from Former Employer" (Oct. 17, 2019), *available at* https://www.justice.gov/usao-edpa/pr/philadelphia-bookkeeper-sentenced-8-years-prison-embezzling-almost-16-million-former (last accessed May 22, 2020); Judgment, ECF No. 37, *United States v. Conner*, No. 2:18-cr-00542 (E.D. Pa. May 30, 2019) (McHugh, J.) (ATM); "Attorney Convicted of Defrauding Elderly Woman Sentenced to Almost 4 Years in Prison" (May 23, 2019), *available at* https://www.justice.gov/usao-edpa/pr/attorney-convicted-defrauding-elderly-woman-sentenced-almost-4-years-prison (last accessed May 22, 2020).

That courts lack authority to revise statutes when applying them to new circumstances stems from the limited role of the judiciary. Within its Constitutional authority, Congress is permitted to legislate broadly—and the Constitution does not require Congress to contemplate every possible application of its enactments in advance, to divine the future, or to legislate anew whenever new circumstances covered by existing statutes arise. *See, e.g.*, *Wisconsin Cent.*, 138 S. Ct. at 2074-75; *Yeskey*, 524 U.S. at 212; *see also Encino Motorcars*, 138 S. Ct. at 1143; *PGA Tour*, 532 U.S. at 689; *Sedima*, 473 U.S. at 499; *Arizona*, 818 F.3d at 557; *Sabre*, 429 F.3d at 1122. Judicial imposition of any such requirement would raise serious questions regarding the separation of powers and would needlessly burden Congress in its legislative function. Indeed, under the

district court's approach, Congress could *never* enact final legislation on any subject matter because uncontemplated or new circumstances *always* exist either before or after enactment of a statute. And the district court's approach would empower the judicial branch to dictate Congress's legislative agenda by requiring it to re-legislate on any topic whenever—in the courts' view—uncontemplated or new circumstances arise.

The district court's approach not only contravenes the controlling cases and invades Congress's legislative prerogative, but also turns statutory construction on its head. The Supreme Court and this Court agree that where statutory text is "clear," courts need not—and should not—resort to examining legislative history. *Encino Motorcars*, 138 S. Ct. at 1143; *Gerbier v. Holmes*, 280 F.3d 297, 309 (3d Cir. 2002) (finding that where "interpretation is obvious, [the courts] should not 'eschew' that phraseology or look to legislative history") (citing *Darby v. Cisneros*, 509 U.S. 137, 147 (1993)). Yet under the district court's regime, courts *always* would be required to examine legislative history as part of reconstructing which "prototypical examples" Congress did or did not "contemplate" at the time of the statute's enactment. This novel approach would unmoor statutory construction from the text's "ordinary meaning," *Gross*, 557 U.S. at 175; *BP Am. Prod. Co.*, 549 U.S. at 91, and unduly complicate the judicial role of faithfully interpreting Congressional enactments.

In all events, whether Congress did or did not contemplate—or failed to divine the advent of—safe injection sites when it enacted and amended section 856(a) "is irrelevant." *Yeskey*, 524 U.S. at 212. All that matters is that section 856(a)'s

"unambiguous statutory text" prohibits Safehouse's proposed facility. *Id.*; *see also Wisconsin Cent.*, 138 S. Ct. at 2074-75; *Encino Motorcars*, 138 S. Ct. at 1143; *PGA Tour*, 532 U.S. at 689; *Sedima*, 473 U.S. at 499; *Arizona*, 818 F.3d at 557; *Sabre*, 429 F.3d at 1122; *supra* Parts I.A-B.

Second, the district court sought refuge for its novel approach in the Supreme Court's decision in *Wisconsin Central*. *See Safehouse*, 408 F. Supp. 3d at 591, 616. But as noted above, *Wisconsin Central*—in a passage the district court ignored—underscores the district court's error by confirming that "new *applications*" of a statute "may arise in light of changes in the world." 138 S. Ct. at 2074 (emphasis in original). At issue in that case was whether stock options paid to employees qualify as "money remuneration" under a statute Congress enacted in 1937. *Id.* at 2070. The Supreme Court did not use the terms "prototypical examples" or "contemplate" in its opinion, let alone probe which "prototypical examples" Congress did or did not "contemplate" when it enacted the statute. Rather, the Supreme Court used dictionary definitions from 1937 to construe the term "money remuneration" and held that stock options fall outside that term's meaning. *Id.* at 2070-71.

The Supreme Court further noted a new application of the statute "in light of changes in the world": "electronic transfers of paychecks," although not "common in 1937, . . . would qualify today as 'money remuneration' under the statute's original public meaning" and, thus, be covered by the statute. *Id.* at 2074-75. So, too, here: section 856(a)(2)'s prohibition on a defendant knowingly making available "*any* place" for the

purpose of unlawful drug use, 21 U.S.C. § 856(a)(2) (emphasis added), applies "in light of" post-enactment "changes in the world" and covers safe injection sites even if they "weren't common" or contemplated at the time of section 856(a)(2)'s enactment, *Wisconsin Cent.*, 138 S. Ct. at 2074-75.

The other passage from *Wisconsin Central* that the district court cited, *see Safehouse*, 408 F. Supp. 3d at 591, only further illustrates its error. The Supreme Court noted:

> Congress alone has the institutional competence, democratic legitimacy, and (most importantly) constitutional authority to revise statutes in light of new social problems and preferences. Until it exercises that power, the people may rely on the original meaning of the written law.

Wisconsin Cent., 138 S. Ct. at 2074. This passage confirms that courts should apply statutes to all circumstances with their "ordinary, contemporary, common meaning," *id.* (internal quotation marks omitted), not—as the district court believed—that circumstances within that ordinary meaning are somehow exempt from statutory coverage if Congress did not contemplate them to the courts' satisfaction at the time of enactment, *see Safehouse*, 408 F. Supp. 3d at 591. In other words, *Wisconsin Central* establishes at every turn that the touchstone of statutory construction is the meaning of the text, not the contemplations of Congress. *See* 138 S. Ct. at 2074-75.

Third, the district court concluded that the "purpose" to engage in unlawful drug activity required by section 856(a)(2) is the defendant's own purpose, not the property user's purpose. *See Safehouse*, 408 F. Supp. 3d at 595-605. But even the district court recognized that this conclusion contradicts the uniform holding of all five circuit courts

to have addressed the issue, *see id.*, and, as explained above, that conclusion contravenes the statute's plain text, *see also supra* Part I.A-B.

Finally, the district court compounded this error when it held that section 856(a)(2) reaches only cases where the unlawful purpose is the defendant's "significant" purpose. *See Safehouse*, 408 F. Supp. 3d at 605-615. But the word "significant" appears nowhere in section 856(a)(2). By grafting that limitation into the statute, the district court acted outside of its "duty to give effect to the plain language of the statute." *Parker*, 870 F.3d at 153 (citing *Ron Pair Enters., Inc.*, 489 U.S. at 241). Moreover, even if section 856(a)(2) referred to the defendant's purpose and required that purpose to be "significant" (neither of which is the case), Safehouse's substantial steps to facilitate unlawful drug use on its property—including furnishing drug users with "consumption and observation rooms," "sterile consumption equipment," and "fentanyl test strips," *Safehouse*, 408 F. Supp. 3d at 586—evince such a purpose, *see supra* Part I.A.

The district court's construction of section 856(a)(2) was riddled with legal error. The Court should reverse the judgment below and enter judgment for the United States.

II. THE POLICY DECISION OF WHETHER TO PERMIT SAFE INJECTION SITES BELONGS TO CONGRESS, NOT THE COURTS.

The district court's departure from the plain text of section 856(a)(2)—and its own description of the facts—appears to have been animated by its policy preference for "harm reduction strategies like the one proposed by Safehouse." *Safehouse*, 408 F. Supp. 3d at 611. The district court applauded Safehouse's "plans to make a place

available for the purposes of reducing the harm of drug use, administering medical care, encouraging drug treatment, and connecting participants with social services." *Id.* at 614. But whether Safehouse's proposed activities are sufficiently beneficial to outweigh the costs to the surrounding citizens, neighborhoods, communities, and property of permitting unlawful drug use to take root at a fixed location is a policy decision within the competence of Congress, not the federal courts. *See Romag Fasteners, Inc. v. Fossil, Inc.*, 140 S. Ct. 1492, 1497 (2020) ("[T]he place for reconciling competing and incommensurable policy goals like these is before policymakers. This Court's limited role is to read and apply the law these policymakers have ordained, and here our task is clear.").

Congress has decided to prohibit any person or entity from knowingly making available "*any* place" for the purpose of unlawful drug use. 21 U.S.C. § 856(a)(2) (emphasis added). The complex and unfolding debate regarding whether to exempt safe injection sites from that Congressional mandate should be presented to—and resolved by—the people's representatives in the legislative branch in the first instance, not the judicial branch. That principle applies with particular force here because the CSA carries criminal penalties. "[B]ecause of the seriousness of criminal penalties, . . . legislatures and not courts should define criminal activity." *United States v. Bass*, 404 U.S. 336, 348 (1971).

The district court erred when it attempted to redefine a Congressional enactment by judicial fiat and to substitute its policy judgment for the judgment of Congress. The

Court should reverse and reserve the policy decision at the heart of the district court's opinion to Congress.

CONCLUSION

The Court should reverse the judgment below and enter judgment for the United States.

May 22, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the Federal and Local Rules in that it contains 5,025 words and was prepared in Microsoft Word and produced with a proportional serif 14-point font. I further certify that the text of the electronic brief is identical to the text in the paper copies. I further certify that version 4.18.2001.7 of the Windows Defender Antimalware and version 1.315.1117.0 of the Windows Defender Antivirus and Antispyware programs have been run on the electronic brief, and no virus was detected. I further certify that I am a member in good standing of the bar of this Court.

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of May 2020, I caused true and correct copies of the foregoing Brief of Amici Curiae to be served on counsel for all parties of record via the Electronic Case Filing (ECF) service.

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